APPEAL NO. 010324

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 18, 2000. The hearing officer had determined that the respondent (carrier) waived its right to dispute compensability but held that the appellant (claimant) had disability beginning October 17, 1997, even though he noted that the claimant was not credible and did not prove that he sustained an injury, had disability therefrom, or gave timely notice to his employer.

In Texas Workers' Compensation Commission Appeal No. 002690, decided December 28, 2000, the Appeals Panel affirmed the injury, waiver, and notice issues but reversed and remanded the disability issue, noting that the hearing officer may have erroneously believed that a waiver by the carrier also acted as a waiver to a dispute of disability. The Appeals Panel noted that the hearing officer had actually found that the claimant failed to carry his burden of proof on disability, and had also awarded a disability period in excess of that contended by the claimant. The hearing officer was asked to determine the disability issue irrespective of the finding on the waiver issue.

Finding that no further hearing was necessary, the hearing officer reconsidered the decision and issued a new decision dated January 25, 2001, that found that the claimant did not have disability as a result of the _____, injury.

The claimant appeals, arguing that the hearing officer had already determined this issue and redetermination was not required. He argues that the carrier did not originally appeal the entire disability period found by the hearing officer. He argues that he has had continuous disability since the date of the injury. He indicates that there was an ex parte contact leading to the different decision. The carrier asks that the decision be affirmed.

DECISION

We affirm the hearing officer's decision.

At the outset, we will quote from the original decision of the hearing officer, issued October 19, 2000:

> The medical records in evidence were all generated after the _____ incident, and there is no conclusive way to differentiate between any damage caused by that incident and that caused by the injury claimed here. Further, the main problem revealed by the medical evidence is a degenerative condition in the claimant's spine. For these reasons, the medical evidence is [sic] no way advances the claimant's case here.
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> By itself, the claimant's testimony was unconvincing. Several items at the very least stretched credibility . . . . Overall, the claimant's evidence did not

sustain his burden on the issue of the occurrence of an injury, disability, or timely reporting.

We note that the record in that case also showed that October 17, 1997, was the last scheduled day of work on that job, although the claimant denied knowing this. The claimant had also returned to work on June 1, 1998.

The Appeals Panel in Appeal No. 002690 affirmed the decision that the carrier had waived the right to dispute an _____, injury. However, as that decision noted, this does not operate as a waiver of the requirement that the claimant prove that he had an inability to obtain and retain employment equivalent to his preinjury average weekly wage (disability). We remanded the decision so that the hearing officer could reconcile his statement in the body of the decision, that claimant had no probative medical evidence and that his testimony did not meet the burden of proving disability, with the finding that the claimant could not obtain employment due to his "low back condition" and had disability through the date of the CCH, even beyond a second asserted injury. The carrier's original appeal disputed that the claimant had any disability after October 17, 1997. It appeared that the hearing officer had erroneously applied his finding of waiver to absolve the claimant of the need to show disability. But it was the responsibility of the hearing officer, as finder of fact, to clear up an apparent discrepancy.

The hearing officer did not err by holding on remand that the claimant did not have disability. A claimant's testimony alone, if believed, is sufficient to establish that an injury has cause disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989). However, the hearing officer had indicated in his first decision, prior to remand, that he did not believe the claimant. In his remand, he notes this, as well as the lack of medical records, and states that any disability after July 31, 1998, are more than likely due to a second claimed injury than to the _____, injury. This second decision is consistent with his first decision as to the evaluation of the claimant's evidence on disability, and does not represent a "sudden change."

We affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge